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LIVING WITH/OUT PROXIMITY: COMPARING A CONTESTED CONCEPT IN TORT

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INTRODUCTION

We approach this article through shared insights gained from the experience of teaching Tort Law together at the University of Reading in England. One of us is a common law lawyer whose perspective was shaped by studying in Canada. As a subject which has evolved in very different ways across the common law world (and the definition of which is further complicated by the presence of Quebec civil law), comparison within the common law is itself often important and intellectually challenging, particularly for tort lawyers. The other comes to the subject as a civilian lawyer trained in Austria but who defines himself first and foremost as a 'European'. It was this complex intellectual and political orientation that he brought to a common law subject that he was teaching (and learning) for the first time. This set of circumstances, we believe, provided us with a 'laboratory' in which to engage in, and reflect upon, comparison, mixture, and the possibility of hybridity in an understanding of the sources, methods and approaches which we take to legal knowledge. It gave us the opportunity to experiment on a micro level with the broad questions with which comparative lawyers engage, and to explore the meaning of a 'mixed jurisdiction' in its broadest formulation.

Nowhere were the challenges of this dialogue more pronounced than when we taught the 'duty of care' question in the law of negligence. It was here that, more than elsewhere, we found ourselves speaking in what appeared to be different legal languages

that we initially found difficult to translate. But that very fact sparked our interest in how we might understand the challenges of comparative law, legal harmonization in the European Union and, indeed, the definition of a mixed jurisdiction. Our experiment has led us to a more nuanced view of legal cultures and systems than we had before, in which we find ourselves eschewing legal cultural purity and the rigid categorization of legal systems. Here we subscribe to a view of culture and identity derived from cultural studies, which understands all culture as inevitably hybrid, dynamic, and a product of interaction which inevitably shapes the identity of all parties to the exchange.¹ These same understandings increasingly have come to inform comparative law and the study of mixed jurisdictions. Legal culture – like culture more generally -- needs to be understood, not in terms of pure entities that can be compared and contrasted, but rather through ‘legal traditions’ internal complexity’.² Thus, in this article, we explore how each of us came to appreciate the complexity of our ‘own’ legal system (while recognizing that we are uneasy answering questions about place and belonging). We attempt to uncover what now seem to us to be complexities within systems which reproduce what are usually described as the differences between them. We illustrate this claim with an analysis of the doctrine of ‘proximity’ in the common law of negligence and we draw comparisons to a civil law understanding of the issue. Through an analysis of what has proven to be an arduous journey through the common law – which has led to a wide diversity of approaches across common law

¹ For an introduction to what is a vast literature, see P GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* (1993); H BHABHA, *THE LOCATION OF CULTURE* (1994); R JC YOUNG, *COLONIAL DESIRE: HYBRIDITY IN THEORY, CULTURE AND RACE* (1995).

² R Leckey, *Cohabitation and Comparative Method*, 72 *MODERN LAW REVIEW* 48, 49 (2009).

jurisdictions – we explore how proximity belies the claim to a uniform or ‘natural’ common law mode of reasoning. We then hold a mirror up to the messiness of this tort doctrine by illustrating the complexities which can be found within civil law attempts to achieve analogous functional limitations on liability. In this, we employ the Austrian jurisdiction as a useful example of this theory. Finally, we attempt to use the lessons learned from this investigation in order to provide some tentative answers to wider questions concerning the value of comparison, the utility of the concept of a mixed jurisdiction, and the potential for European harmonization of tort law.³

PROXIMITY AS MULTIPLICITY IN THE COMMON LAW

We begin with the centrality of the duty of care concept in the common law tort of negligence. In fact, the historical development of the duty of care is frequently deployed as a pedagogic tool to explain how tort law (as emblematic of the common law itself) has developed from a series of disconnected legal duties into a general duty of care on which a

³ It seems appropriate that this article began life for a conference devoted to ‘Filling the Gaps’. The idea of legal gaps in itself is emblematic of how a gulf appears between civil law and common law reasoning. As Professor Chiassoni explains, for civilians, the gap may be a theoretically unproblematic ‘mere *possibility* for every given legal order, or any section thereof’ (p 54). For common law theorists, by contrast, the gap raises fundamental conceptual ‘inter-related issues concerning judicial discretion, the existence of right answers to legal problems, and law’s determinacy (or indeterminacy). ... the very nature and guiding powers of legal rules’ (p 74): P Chiassoni, *A Tale from Two Traditions: Civil Law, Common Law, and Legal Gaps*, 2006 ANALISI E DIRITTO 51 (2006), available at <www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi_2007/03chiassoni.pdf>.

principled tort law was grafted. This story is highlighted by the momentous attempt to articulate a general test for the duty of care through the concepts of foreseeability and neighbourhood.⁴ In this way, it is made immediately clear that the duty has built within it the control mechanism by which liability is inevitably limited, in that it is a duty owed to one's neighbour rather than to the world at large. For the purist of the common law, this is a necessarily principled limitation which constrains and shapes the general duty of care no matter the novelty of the category or scenario that may arise. As students of English common law tort are taught from day one, the duty is grounded in the relationship between claimant and defendant. That is, the 'relational nature of the personal obligation' limits to whom the duty of care is necessarily owed.⁵

But while the duty of care is constitutively a limited one in that sense, the genius of Lord Atkin's judgment in *Donoghue v Stevenson* was its breadth and generality – that potentially it could apply to any category of case. In short, it was a *general* duty of care, and the implications of his judgment to some extent were implicit in Lord Atkin's words. In this moment, the formulation of a general duty replaces the fragmented set of specific non-contractual duties that had evolved through the history of the common law. In making this shift, the House of Lords started from a principle of generality familiar to the civil law tradition. Indeed, the common law textbook tradition, which began in the nineteenth century, was itself an attempt to categorize (into subjects) and to generalize (from

⁴ *Donoghue v Stevenson* [1932] AC 562 (HL).

⁵ S Van Praagh, *Palsgraf as "Transsystemic" Tort Law*, 6 JOURNAL OF COMPARATIVE LAW 243, 250 (2012).

principles) using the masses of case law that had grown up through the history of the common law.⁶ This is an important element of the peculiar history of English legal education and the emerging role of law within the university and was guided by the new common law professor. It was the academics' claims regarding the scientific study of law (which was indebted to the principles of scientific classification that so dominated the period) that justified the place of law in the university and which established the law professor as the classifier and organizer of doctrine into a set of general statements of principle that could be applied (even if in a formalistic fashion). That process did not occur in a historical vacuum. Not only were the methods of other academic disciplines influential, but the civil law tradition was inevitably influencing this incredibly important professional group seeking to establish its identity and role in society.⁷

The supreme irony, of course, is that *Donoghue v Stevenson* is a case from Scotland, a mixed jurisdiction which 'has drawn from the civil law world over time to a significant and telling degree'.⁸ Given that the same Law Lords heard appeals from both jurisdictions, it is hardly surprising that developments in each legal system influenced the other, although 'the

⁶ See D Sugarman, *Legal Theory, the Common Law Mind, and the Making of the Textbook Tradition*, in LEGAL THEORY AND COMMON LAW 26 (W Twining ed., 1986).

⁷ See generally A W B Simpson, *Innovation in Nineteenth Century Contract Law*, 91 LAW QUARTERLY REVIEW 247 (1975).

⁸ D L Carey Miller and M M Combe, *The Boundaries of Property Rights in Scots Law*, 10.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW 1 (2006), available at <www.ejcl.org/103/art103-4.pdf>.

two systems are built on entirely different foundations'.⁹ Students, academics and practitioners throughout the common law world rarely note, however, that *Donoghue v Stevenson* is 'perhaps the most famous example of English law treating a Scottish private law case as legal authority',¹⁰ illustrating vividly the impact of a mixed jurisdiction on the development of the common law.

The simplicity of the duty of care formula belies the actual complexity and diversity within the historical development of the common law of tort, which was never straightforward. Within English common law, the tensions were made obvious by the apparently broad rearticulation of the test as a presumption of duty for all foreseeable injury, subject to any contrary policy concerns that might negate it, leaving unclear whether the foreseeability stage necessarily contained within in some additional control device on liability.¹¹ This was followed by the famous judicial retreat towards the incremental development of the categories of negligence liability and the current three stage *Caparo* test which reclaims the language of proximity as a control device on factual foreseeability.¹² This is combined with the residual categorical requirement by which policy concerns potentially can negate liability for harm that is otherwise foreseeable and proximate. All of these inquiries are contained within the contours of the duty inquiry.

⁹ *Ibid.*, 2.

¹⁰ *Ibid.*, fn 7.

¹¹ *Anns v Merton London Borough Council* [1978] AC 728 (HL).

¹² *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL).

For our purposes, of particular interest is the role of proximity in this analysis, which continues to cause judicial and academic consternation in terms of whether it possesses some independent meaning as a test against which facts in a novel case can be measured.¹³ This has led to vociferous academic debate within tort law scholarship between corrective justice ‘purists’ and those who understand tort law in more ‘legal realist’ terms.¹⁴ That battle centers on how we should explain proximity as a control device limiting the scope of liability. By definition, corrective justice theorists are skeptical of the appropriateness and usefulness of policy based arguments to control tort liability, which they argue is an inappropriate intrusion by distributive justice principles. For corrective justice advocates, proximity can achieve a degree of certainty and principle in shaping the duty analysis, provided that it remains focused on the bipolar relationship between the parties and avoids an open ended ‘legal intuitionism’ which leads to unpredictability of outcome.¹⁵ Furthermore, they claim that the failure of courts to structure their reasoning in terms of the relationship between the parties giving rise to a duty has led to a ‘disintegration’ of the law of negligence into a series of duties without the analytical tools to reason across

¹³ See eg R Kidner, *Resiling from the Anns Principle: The Variable Nature of Proximity in Negligence*, 7 LEGAL STUDIES 319 (1987).

¹⁴ For two starkly opposing positions, see eg A Beever, *Corrective Justice and Personal Responsibility in Tort Law*, 28 OXFORD JOURNAL OF LEGAL STUDIES 475 (2008) and J Stapleton, *The Golden Thread at the Heart of Tort Law*, 24 AUSTRALIAN BAR REVIEW 135 (2003-2004).

¹⁵ A Beever, *Particularism and Prejudice in the Law of Tort*, 11 TORT LAW REVIEW 146, 147 (2003).

different types of case.¹⁶ In this way, the common law has reverted back to a series of different duties with little analytically holding the mosaic together.

By contrast, those with a more 'legal realist' orientation are deeply skeptical of this divorcing of principle and policy and they argue that corrective justice theorists have overstated their concerns. Rather than *ad hoc* decision making, we have reached an historic moment in which we have a series of 'pockets' of liability (such as the categories of economic loss) based upon specific factors of both principle and policy which drive the determination in each type of case.¹⁷ The outcomes therefore are relatively predictable. As long as the reasoning within each pocket of liability is coherent, consistent, predictable and open, there is little reason for concern as to how we get to that point. The claim that proximity is a meaningful definitional element of the duty question is at best a fiction and at worst a source of confusion that muddies a functional analysis.¹⁸

We would argue, however, that what has become a vociferous debate can be examined through the lens of comparative law. We are indebted here to Professor Van Praagh's claim that 'as the professors in a transsystemic classroom keep insisting, the line between civil and common law is not as clear as we might be tempted to think or as we

¹⁶ E Weinrib, *The Disintegration of Duty*, 31 *ADVOCATES' QUARTERLY* 212 (2006).

¹⁷ J Stapleton, *Duty of Care Factors: A Selection from the Judicial Menu*, in *THE LAW OF OBLIGATIONS* 59 (P Cane and J Stapleton, eds., 1998).

¹⁸ J F Keeler, *The Proximity of Past and Future: Australian and British Approaches to Analysing the Duty of Care*, 12 *ADELAIDE LAW REVIEW* 93, 101 (1989).

might want.¹⁹ Van Praagh uses the famous American case of *Palsgraf*²⁰ to demonstrate her point, arguing that the contrasting approaches of Justice Cardozo and Justice Andrews provide a microcosm of two distinct analytical approaches (*within* a common law judgment) which parallel the contrasting ways in which the civil and common law place limitations on the defendant's liability to the claimant for extra-contractual losses. Justice Cardozo focuses on 'the relational nature of the personal obligation in the tort of negligence',²¹ a position to which the corrective justice theorists are intellectually wedded. For Justice Andrews, the very fact that the claimant was injured means that a relationship is formed and the question is whether the cause is proximate. That determination is necessarily inexact and proximity ceases to exist at some point: 'because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics'.²² This statement precisely exemplifies what corrective justice theorists rail against. But for legal realists, it provides a refreshing openness to the realities of judicial decision making (and, not surprisingly, it was written in an era in which legal realism as a movement was at its high water mark). For van Praagh, Justice Andrews' dissent represents the road not taken by the common law – an approach which uses an

¹⁹ Van Praagh, *supra* note ___ at 247.

²⁰ *Palsgraf v Long Island Railroad Co.*, 248 NY 339, 162 NE 99 (New York Court of Appeals).

²¹ Van Praagh, *supra* note ___ at 250.

²² *Ibid.*, 251.

open ended analysis based on causation as a control device on liability which closely replicates the structure of the Civil Code of Quebec (the comparator in her analysis).²³

Furthermore, the disagreements around the formulation of the duty of care inquiry are evident in the diverse ways in which the common law has developed worldwide. Perhaps in no other area have we seen appeal courts advance by way of different forks in the common law road, particularly in light of the retreat from *Anns* by the House of Lords.²⁴ This led the Judicial Committee of the Privy Council itself to acknowledge that, at least with respect to some aspects of the duty of care, there is not one common law, but a range of valid common law approaches.²⁵ For example, despite the decision of the House of Lords to repudiate the *Anns* approach, the Supreme Court of Canada has remained generally wedded to its formula. In *Cooper v Hobart*, the Court replicated the two stages of *Anns*, although greater guidance was provided into the reasoning process to be undertaken by courts.²⁶ In a jointly authored judgment, Justice McLachlin and Justice Major made clear that the first stage demands consideration, not only of reasonable foreseeability as a matter of fact, but also whether the relationship satisfies a legal requirement of sufficient closeness which they describe as proximity.²⁷ Interestingly, however, the judgment also recognizes the role of

²³ *Ibid.*

²⁴ See C F Stychin, *The Vulnerable Subject of Negligence Law*, 8 INTERNATIONAL JOURNAL OF LAW IN CONTEXT 337 (2012).

²⁵ *Invercargill City Council v Hamlin* [1996] 1 All ER 756 (PC).

²⁶ *Cooper v Hobart* [2001] SCC 79.

²⁷ *Ibid.*, para 30.

those policy factors which are tied to the relationship between the parties at that first stage analysis. The second stage consists of those policy factors which lie ‘outside the relationship of the parties that may negative the imposition of a duty of care’.²⁸ On the facts, the defendant – a public body charged with the regulation of financial services – was found to owe no duty to an investor at stage one, based on the absence of a sufficiently close relationship between the parties. For critics of the judgment, its reasoning opens the door to open ended, *ad hoc*, policy driven analysis, which has been described as a ‘ramshackle enquiry’²⁹ and a ‘stuff sack’³⁰ which holds a plethora of otherwise unconnected factors to be judicially called upon in order to achieve some rough sense of justice. Although the Court does not explicitly turn to a comparative law analysis in *Cooper v Hobart*, the development of Canadian tort law – particularly in the landmark economic loss cases – demonstrates an openness to comparative civil law analysis and it is perhaps no surprise that the Court has departed from the rigidity of English doctrine on the existence of a duty of care.

Even further extreme in the judicial deconstruction of the proximity requirement is the current approach of the High Court of Australia, which ultimately rejected proximity as a conceptual tool in favor of the ‘salient features’ approach, in recognition of the fact that ‘different classes of case give rise to different problems in determining the existence and

²⁸ *Ibid.*

²⁹ Weinrib, *supra* note ___ at 238.

³⁰ M P Gergen, *The Ambit of Negligence Liability for Pure Economic Loss*, 48 ARIZONA LAW REVIEW 749, 749 (2006).

nature or scope, of a duty of care'.³¹ Salient features are simply those factors which the courts are to weigh and balance in determining whether there is sufficiently compelling reason to attach legal liability to a situation of harm. That list of factors includes both those centering upon the relationship between the parties as well as on broader distributive concerns. The approach can be understood as a 'drilling down' into the concept of proximity in order to provide guidance for future courts: 'to infuse meaning and provide a set of practical analytical factors'.³² In sum, our argument is that with proximity we see judicial methodological choices being made which, to varying degrees, subvert the common law claim to focus upon the bipolar relationship as a basis for the imposition of liability.³³ In the process, we move instead towards more open ended, policy informed analysis in which allegiance to the language of duty increasingly becomes formal and *ex post facto*. The current Australian focus on salient features – particularly in the way in which it is being applied by lower courts – appears closer to the notion of proximate cause than it does to the rigidity of the corrective justice conception of the duty relationship founded purely on 'principle'.³⁴ It is an explicitly open ended search for whether there is sufficient connection

³¹ *Sullivan v Moody* (2001) 207 CLR 562 at 579.

³² D Tan, *The Salient Features of Proximity: Examining the Spandeck Formulation for Establishing a Duty of Care*, 2010 SINGAPORE JOURNAL OF LEGAL STUDIES 459, 466 (2010).

³³ The willingness of some members of the Supreme Court of England and Wales to explicitly consider distributive justice issues in tort law provides another, and probably the most stark example of this subversion. See eg *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, per Lord Hoffman.

³⁴ See eg *Caltex Refineries (Qld) Ptd Ltd v Stravar* [2009] NSWCA 258.

between the parties and could as easily be framed in terms of causation rather than duty. For corrective justice purists, this is a complete subversion of their belief that common law liability in negligence should be founded solely on the principled relationship between two parties.

Proximity provides, we argue, a useful lesson which should caution us against generalized claims about common law reasoning. The case of *Donoghue v Stevenson* – which has achieved such folklore status in the story of the common law – is significant precisely because of Lord Atkin’s attempt at creating a generalized conception of duty from the particular duties which had grown up over time. That attempt at generality can be understood, not as the logical outcome of common law development, but as the replication of a civilian tradition (one which we believe he would have been very familiar). The control device on liability of ‘the neighbour’ – proximity – is seen as a uniquely common law mechanism to constrain liability from the outset of the analysis by focusing on the factors connecting two parties in order to establish duty. However, the way in which proximity has proven to be such an intractable problem for common law courts has led to a fragmentation of common law approaches and we increasingly see an open ended factorial analysis determining the outcome. That approach in some guises comes to resemble the use of proximate cause as a control device which mixes principle and policy and which may prove to be increasingly open to fact specific determinations. In this moment, the common law duty question appears to be deconstructed. As tort lawyers, we find ourselves left with a loss of our certainties regarding any sense of the ‘purity’ of common law culture, which seems to have an identity best characterized, not in terms of purity, but in the language of tensions, complexity, hybridity and even mixture. In exploring this contested meaning to

proximity, it is hardly surprising that one of us asked the other the question that common law lawyers are so fond of asking of their civilian counterparts: ‘so how does the civil law deal with the problem?’ It is to the difficult task of trying to answer that question that we now turn.

PROXIMITY IN THE CIVIL LAW SYSTEM – AN UNACKNOWLEDGED CONCEPT

In this section, we expand upon the answer which one of us gave to that question and we underscore the challenge which he experienced in trying to make sense of proximity from a civilian perspective (and the point of comparison for our purposes is the Austrian civil law). However, as with the attempt to understand one system through comparison with the other, we again found ourselves – as with the common law -- uncovering the complexity and ‘otherness’ within civil law concepts themselves. Not surprisingly, here the starting point is the relevant provision of the Austrian Civil Code, which reads: ‘Everybody is entitled to demand indemnification for damage for a person causing injury by his fault; the damage may have been caused either by the violation of a contract or without regards to a contract’.³⁵ On its face, the norm clearly suggests that the answer to the question of who can be held liable is simply ‘any person’. In this respect at least, the Austrian approach is emblematic of a civilian understanding, by which ‘[a] duty expressed in such general or universal terms is characteristic of a civil law approach.’³⁶ But, as we will argue, the

³⁵ § 1295 *Allgemeines Bürgerliches Gesetzbuch* (ABGB; Austrian Civil Code), translation ours.

³⁶ Van Praagh, *supra* note __ at 248.

apparent simplicity of this answer, on closer examination, is undermined by the appearance of tensions and complexity.

To return to the question with which we found ourselves grappling as teachers, we can ask what devices do civil law systems have at their disposal in order to limit or control the scope of liability in order to constrain the reach of liability? The standard answer which common law lawyers with an interest in the civil law are likely to provide is that civil law systems use causation in order to limit what are otherwise potentially overbroad liabilities.³⁷

To repeat the point we made earlier, this is the tradition which Van Praagh argues that Justice Andrews in *Palsgraf* mimics. Justice Andrews holds that the judge must examine:

[W]hether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or, by the exercise of prudent foresight, could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space.³⁸

Our claim is that, as with the development of the common law, the simplicity of this formulation can be deceptive as new concepts have evolved over time, and the result becomes instead a mixture of processes of legal reasoning.

³⁷ *Ibid.*, 252.

³⁸ *Palsgraf*, *supra* note __ at 104. This was, in fact, also very much the approach pursued in order to limit liability in the Austrian system before the concept of the protective purpose of the norm, which we discuss in the next section, was available. See R Welser, *Der OGH und der Rechtswidrigkeitszusammenhang*, 30 ÖSTERREICHISCHE JURISTEN ZEITUNG 1 (1975)

For example, the Austrian approach reveals that, rather than the straightforward use of causation applied on a fact specific basis to control liability, the determination of liability includes moments in which closer parallels can be drawn to common law methodology. We illustrate this claim by exploring three categories of case. The first perhaps best illustrates the common law lawyer's stereotype of civilian reasoning. This rule focuses upon 'the protective purpose of the norm' (*Rechtswidrigkeitszusammenhang*), by which legal responsibility is established without making reference to the relationship between claimant and defendant at all. From the perspective of the common law lawyer, this category appears to be the most 'other' because it does not rely upon the relationship to ground liability specifically, or lack of proximity to conclude that no legal relationship exists. Nor does it need a device to control the frontier of liability since it does not rest upon the idea of duty at all. But, in addition, within Austrian law there are two further categories which, we argue, have parallels to the role of proximity in tort. The two categories share reliance upon the fiction of contractual relationship which proves to be legally advantageous for the claimant when the relationship is in fact non-contractual. The first category is the doctrine of *culpa in contrahendo* and the second is best described as 'contract with protective effect for third parties'. It is to these rather more complicated elements of the story of liability within the civil law that we now turn.

'The Protective Purpose of the Norm' (*Rechtswidrigkeitszusammenhang*)

We begin then with the doctrine of 'the protective purpose of the norm', which itself defies the claim that it is causation that provides the only control device on liability in at least this civilian context. Rather, the protective purpose of the norm limits liability in a distinctive

fashion, which serves to underscore the pluralism and diversity within the civil law which should not be erased. The decision of the Quebec Court of Appeal in *Brisson v Potvin*³⁹ can be used to illuminate the point. In this case, a driver parked his truck upon the sidewalk. As a consequence, a child ran into the street in order to avoid the truck and was hit by an oncoming car. Intuitively, it appears that causation is easily established, but the Court found no liability on the part of the driver of the truck because there were too many intervening events and therefore *cause adequate* was not present.

Within Austrian law, by contrast, a rather different means of controlling liability would be utilized. Rather than turning to proximate cause, the issue is simply and exclusively an interpretation of the norm. To reiterate, the relevant section of the Austrian Civil Code states that the claimant may be compensated for damage 'caused either by the violation of a contract or *without regards to a contract*' which suggests that the central limit on liability remains causation. But the Austrian courts developed an alternative mechanism to control liability and it is here that the concept of the 'protective purpose of the norm' plays a crucial role. At the turn of the previous century, it was still very exceptional for Austrian courts to make reference to this concept. However, this dramatically changed and the courts began to increasingly rely upon it, leading to its extensive development through academic writing, reaching its peak in the 1960s.⁴⁰ Without the existence of the doctrine, it would have been necessary, as the Quebec Court of Appeal had done, to show damage, causation and fault. Logically, liability could be limited only by showing that one of those

³⁹ *Brisson v Potvin* [1948] Quebec KB 38.

⁴⁰ Welser, *supra* note __ at 1.

requirements was not met, thereby forcing a court into what can be a difficult and contested analysis of causation.⁴¹ The doctrine of the protective purpose of the norm changes that dynamic.

This shift can be illustrated by reference to decisions of the Highest Austrian Civil Court. In one case, guidance was given on how to determine the protective purpose of a norm. According to the Court, the protective purpose of a norm can be found from its content (*'Der Schutzzweck der Norm ergibt sich aus ihrem Inhalt'*), which in itself is rather unhelpful (and circular) reasoning.⁴² But as every first year law student knows, it is necessary to apply the rules of statutory interpretation in order to determine the meaning of legislation. Thus, the Court suggests – and, of course, the Court reinforces every common law lawyer's stereotype about statutory interpretation within the civilian system in doing so -- that the protective purpose of the norm can be established through a teleological interpretation (*'Das Gericht hat das anzuwendende Schutzgesetz teleologisch zu interpretieren'*).⁴³ It is here that we find the control device on liability in that it requires congruence between the specific form of harm suffered and the law's purpose.

Once again, the point might best be illustrated through an example. According to the Austrian Road Traffic Law, the speed limit for cars within built up areas is fifty km/h. What happens if a person drives at seventy km/h within a built up area and is subsequently

⁴¹ *Ibid.*; see also R LANG, NORMZWECK UND DUTY OF CARE 14-15 (1983).

⁴² OGH, 8 Ob 133/78.

⁴³ *Ibid.*

involved in an accident on the same journey but not within the built up area? We could frame the issue in terms of causation. The argument in favor of liability would be that if the defendant had driven within the legal speed limit within the built up area then he would have arrived later at the spot where the accident eventually happened and no accident would have occurred. If one relies exclusively upon what the Austrian lawyer calls '*Äquivalenzlehre*' ('*conditio sine qua non*') or the English lawyer the 'but for test', this would lead to a counterintuitive result. Therefore, as in the common law, the Austrian lawyer would apply further instruments to limit causation. The common law lawyer would make reference to fault, whereas the Austrian lawyer within causation would invoke the '*Adäquanzprinzip*' (principle of adequacy). The concept should eliminate rather atypical chains of causation (such as the egg-shell skull). Needless to say, this 'second leg' of Austrian causation does not really help to limit causation in our case because it is not out of the ordinary that accidents happen when one drives a car.

In this context, the concept of the protective purpose of the norm may be a helpful control device, which is to be distinguished from the principle of adequacy.⁴⁴ The protective purpose of the norm (subjective intention of the legislator⁴⁵) conceptually does not belong to the test of causation (which is established through the objective bystander⁴⁶) but there does remain a link: Bydlinksi makes the point that only damages which fulfill the 'principle of

⁴⁴ P Bydlinksi, *Schadenersatzrechtliche Überlegungen anlässlich eines Verkehrsunfalls*, 29 ZEITSCHRIFT FÜR VERKEHRSRECHT 193, 197 (1984).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

adequacy' will be tested to determine whether the protective purpose of the norm is infringed.⁴⁷ This means that the causation test is relatively unproblematic in Austria because the real control mechanism in this case is taking place on the next level of analysis. For our purposes, this would mean that in order to establish the protective purpose of the speed limit within the built up area, we would conclude that the purpose was to provide better protection for pedestrians and cyclists who naturally meet more often in these areas. Therefore, any accident that occurs as a consequence of speeding within a built up area would be clearly covered. But the purpose of the lower speed limit is clearly not to prevent accidents outside of the built up area, which suggests that no liability would attach in this case.

The way in which the protective purpose of the norm limits liability can be illustrated through a second example. Due to heavy traffic through the Alps causing pollution, the legislature through statute allows for a reduction in the speed limit (from 130 km/h to 100 km/h) whenever air quality reaches a critical level. Clearly the protective purpose of the norm is environmental rather than accident prevention. If a driver speeds and an accident occurs as a consequence, the fact that the person overstepped the speed limit should not lead to liability. After all, the speed limit was in place for environmental and not safety reasons. In a result which will seem very counterintuitive to a common law audience, there will be no liability.⁴⁸

⁴⁷ *Ibid.*, 198.

⁴⁸ *Cf. ibid.*, 197.

In sum, the protective purpose of the norm can provide an additional control device on liability, although we recognize that the hypothetical examples we have raised thus far concern the interpretation of secondary legislation which can lead to individual liability, rather than the interpretation of the Civil Code itself. Nevertheless, the significance of the doctrine can be illustrated by returning now to the judgment of the Quebec Court of Appeal in *Brisson v Potvin*. For an Austrian court, the emphasis would be on the law which was overstepped and the determination of its protective purpose. While the Quebec Court of Appeal turned to causation as a control device, an Austrian court might well simply refer to the protective purpose of the traffic law that was violated. We could make at least a credible argument that one reason why traffic laws prohibit parking on sidewalks is because parked vehicles can obstruct the view of drivers and pedestrians, and therefore liability on these facts would fall squarely within the purpose of the rule. Of course, if that is not the purpose, then the Austrian court would find itself in agreement with the Quebec Court of Appeal, but would have arrived there by a very different route.

To this point, it appears that the concept of proximity has no analogue within the Austrian system because liability can be limited through quite a straightforward device of teleological interpretation in the form of the protective purpose of the norm doctrine. However, that appearance is deceptive because there remain two categories of cases in which the 'proximity to proximity' becomes much nearer. What unites these categories is that, despite the fact that there exists no contractual relationship between the parties, nevertheless a legal fiction of the existence of a contract is employed in order to enhance the chances of the claimant's recovery.

Culpa in Contrahendo

The category of *culpa in contrahendo* (cic) deals with the pre-contractual situation. The Austrian Civil Code makes no reference to this category. Rather, cic has been created through analogy⁴⁹ by the courts and it has now become part of the customary law.⁵⁰ Once cic is established, liability rules (based on contract) apply to the parties, which benefits the claimant (compared to the rules governing *liability ex delicto*). Our concern in this article is not the rules *per se* (which are complex), but the method of reasoning that the courts employ. In order to establish cic, the claimant need only be a *potential* contractual partner, such as the customer of a pub. In one case, a person entered a pub but fell and was injured because the path leading to the pub was still icy despite the fact that the owner had cleared the path of snow. In order for the defendant to be held liable in negligence, the Court pointed out that cic needed to be established. The Court held that the case turned on whether the claimant had the intention to enter the pub as a potential customer.⁵¹

Central to the doctrine of cic is the relationship between the two parties and it is from the relationship that a duty arises. Some argue that the reason for cic having this function is that social contact requires trust and if this relationship of trust is violated then

⁴⁹ ie §§ 878, 248, 866, 869, 874, 932(1) ABGB.

⁵⁰ OGH, 3Ob 666/78.

⁵¹ *Ibid.*

this should have consequences.⁵² Understood in this way, *cic* is closely linked to the concept of vulnerability – ‘the connectedness from which an ethical responsibility to the other arises’ -- which one of us has argued has a central role to play in common law tort.⁵³ Likewise, *cic* expresses a certain closeness and, in this regard, there are parallels to the function which proximity performs in the common law. Only if there is a sufficiently close relationship between the parties can liability based upon *cic* follow. Although it is a narrower doctrine than proximity -- applying only to the pre-contractual situation -- its emergence has further parallels to the way in which common law courts have grappled with the development of concurrent liability in tort and contract as well as the ‘near to contract’ type claim in negligence.⁵⁴ This should also seem familiar to common law lawyers in terms of the method of legal reasoning. The courts are developing legal doctrine and then using previous judgments as the basis for defining duties in subsequent cases. We would argue that it illustrates Professor Palmer’s claim that there exists ‘a kind of double reasoning process’ within civilian systems.⁵⁵

⁵² G Frotz, *Die rechtsdogmatische Einordnung der Haftung für culpa in contrahendo*, in GSCHNITZER GEDENKSCHRIFT 163, 165 (C Faistenberger and H Mayrhofer, eds., 1969).

⁵³ Stychin, *supra* note ___ at 346.

⁵⁴ See eg *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506 (HL); *White v Jones* [1995] 2 AC 295 (HL).

⁵⁵ V V Palmer, *Double Reasoning in the Codified Mixed Systems – Code and Case Law as Simultaneous Methods*, TULANE UNIVERSITY SCHOOL OF LAW PUBLIC LAW AND LEGAL THEORY WORKING PAPER SERIES 2012/17 (2012) 3.

Another example from the Austrian civil law concerned a claimant who slipped on a grape in a self-service shop and was injured. This again was found to amount to a contractual relationship, although the highest Austrian Court in civil matters (OGH) ultimately rejected the defendant shop owner's liability because that would go beyond what can be reasonably expected of him.⁵⁶ Yet again we see the role of conceptual nearness between the parties establishing a relationship that potentially leads to liability. It is easier to identify than in the common law because here it refers to spatial proximity from which functional proximity can be readily assumed. Nevertheless, its emergence within the civil law provides a 'trace' of a form of analysis usually associated with common law reasoning. However, there remains one further piece of evidence to examine in relation to our thesis, and that is our last category of cases concerning 'contract with protective effect for third parties.'

Contract with Protective Effect for Third Parties

The starting point for our analysis of this doctrine is again the interpretation 'everybody' in the Austrian Civil Code.⁵⁷ In this scenario, the question is the extent to which a contractual relationship between two parties spills over in order to protect a third party who is not party to the contract. The position in the Austrian civil law is that the third party will be provided with the same level of protection as would be available if she was a party to the contract and in excess of what would otherwise be available in tort.

⁵⁶ OGH, 2Ob541/81.

⁵⁷ § 1295 ABGB.

A classic example, not too different from *Donoghue v Stevenson* in principle, would be the following 1934 Austrian case:⁵⁸ a person bought a bicycle in a shop but was then injured because the bike was faulty. He sued the manufacturer and not the retailer and the issue was whether he could be compensated for his injuries. One way to establish the liability of the manufacturer with regard to the third party, the buyer, would be through liability *ex delicto*. However, the problem is that, as previously argued, it is necessary to show that the harm was part of the protective purpose of the norm; no neighbour principle is at play here. The difficulty is twofold: first, the burden of proof is on the buyer, and second, the courts generally apply a rather strict interpretation in order to avoid limitless liability which could endanger business.⁵⁹ However, the alternative approach is to construct the contract between the manufacturer and retailer as a contract with protective effect for the consumer. The obvious advantage is to reverse the burden of proof.⁶⁰ But the problem remains as to how to avoid limitless liability in the absence of the neighbour principle. The solution which Austrian law has devised is to require answers to two inquiries. First, a third party is protected when the two contracting parties could foresee the contact of a third party within the contractual duty. In our case, if a retailer buys a bike it is certainly foreseeable that a third party will buy the bike eventually. After all, the retailer would not purchase the bike if it did not hope to eventually sell it to the third party. The same, one can

⁵⁸ OGH, 3 Ob 15/32.

⁵⁹ H BARTA, ZIVILRECHT. GRUNDRISS UND EINFÜHRUNG IN DAS RECHTSDENKEN II 632 (2004, 2nd ed.).

⁶⁰ H Koziol, *Delikt, Verletzung von Schuldverhältnissen und Zwischenbereich*, 116 JURISTISCHE BLÄTTER 209, 212 (1994).

argue, applies in *Donoghue v Stevenson*: the ginger beer is sold by the manufacturer to cafe owners in order to be consumed; nothing else was done in that case. There is also a second inquiry which helps to limit liability, and that is the concept of 'interest'. Although the seller has no specific interest in the well being of the buyer, the retailer is nevertheless interested in its own reputation. In other words, the retailer has a business *interest* in the purchaser of the bike not being injured by an item sold in its shop.⁶¹

Here again, we see a civilian court determining the breadth of a defendant's liability by first determining the existence of a sufficiently close relationship between the parties. That proximity is measured by reference to the nearness of the claimant to a contract to which he is not a party.⁶² In this regard, parallels can be drawn to the dilemmas faced by the common law in those areas of tort which are very near to contract but where the claimant is unable to sue in contract because she is not a party to it.⁶³ The issue remains whether the requisite closeness between the parties exists and it is from that finding of sufficient

⁶¹ F Bydlinski, *Vertragliche Sorgfaltspflichten zugunsten Dritter*, 82 JURISTISCHE BLÄTTER 359, 363-364 (1960).

⁶² Interestingly, it has been argued that, under Scots law, *Donoghue v Stevenson* itself could have been argued in terms of third party rights under a contract through the doctrine of *jus quaesitum tertio*, 'if Mrs Donoghue had been able to show that the contract between Stevenson and Minghella was meant by these parties to give her as the ultimate consumer for whom the goods were intended a right to damages for defects in the good supplied': H MacQueen, *Concrete Solutions to Liability: Changing Perspectives in Contract and Delict*, UNIVERSITY OF EDINBURGH SCHOOL OF LAW WORKING PAPER SERIES 2011/38 (2011).

⁶³ See eg *White v Jones* [1995] 2 AC 295 (HL).

proximity that any potential for liability arises; rather than a duty owed to the world at large which is then constrained by causation.

In sum, our experiment led us to the conclusion that a close analysis of a civilian approach to liability uncovered – from the perspective of the common law lawyer – examples both of the strange but also of the familiar. The stereotypical contrasts between inductive and deductive reasoning began to break down in our minds. At the same time, we came to recognize that simplistic attempts to find the analogous doctrine in the other system performing the same function do not necessarily give rise to a satisfactory (or satisfying) outcome.

FROM PROXIMITY TO UNITY?

Our foray into comparative law initially was the product of circumstance as we found that comparison and translation were our methods for explanation and conversation. Yet we also found that the attempt at greater mutual understanding of legal systems could result in us speaking at cross purposes and we became frustrated at the difficulty of the exercise. But the experience leads us now to some tentative views regarding the broader implications of our analysis for the definition of a mixed jurisdiction, attempts at comparative tort law, and the legal harmonization project within the European Union. Yet even here we have experienced a certain degree of mixture, diversity and ambiguity in the way in which we interpret a shared experience.

As ‘outsiders’ to the mixed jurisdiction community, we have found ourselves in the privileged position of being able to observe the way in which the field is developing in

interesting new directions with which we find ourselves in much sympathy. The origins of the idea of the mixed jurisdiction – and indeed of comparative law -- seem to have been strongly influenced by attempts at scientific classification more generally. The mixed jurisdiction emerges as a kind of ‘in between’⁶⁴ two pure forms that also resembles to us the mythological creatures produced through the crossing of species. In fact, we have always found mixed jurisdictions to be somehow strange but also strangely ‘exotic’, mysterious and unknowable.⁶⁵ Perhaps that makes it unsurprising that scholars of mixed jurisdictions in recent years have articulated an identity based on the idea of experimentation and the open competition between ideas and concepts fueled by ‘the *continuous* desire to look for comparative inspiration’.⁶⁶ In this interpretation, the mixed jurisdiction provides the best of both worlds and could be a model for the social construction of a new legal system. Rather than being a strange creature produced through some transgression, mixed jurisdictions instead are laboratories for living with complexity. It is perhaps no surprise then that they provide, some would argue, a model to be replicated by the European Union in the process of legal harmonization of private law.⁶⁷

⁶⁴ V V Palmer, *Two Rival Theories of Mixed Legal Systems*, 12.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW 10 (2008), available at < <http://www.ejcl.org/121/art121-16.pdf>>.

⁶⁵ We employ the term ‘exotic’ deliberately here in order to conjure up images of the age of exploration.

⁶⁶ J M Smits, *Mixed Jurisdictions: Lessons for European Harmonisation?*, 12.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW 7 (2008), available at <<http://www.ejcl.org/121/art121-23.pdf>>.

⁶⁷ *Ibid.*, 1.

However, for our purposes, we find the emerging understanding of the mixed jurisdiction as an all inclusive, universal descriptor to be more conceptually satisfying. As Professor Palmer has demonstrated, the traditional definition leaves the 'normal' undisturbed and unexamined.⁶⁸ Rather, the focus is exclusively upon 'the heterogeneous family of "the others"'.⁶⁹ Of course, centering attention upon the exceptional and the unusual in itself can be a disruptive intellectual act, challenging the received wisdom that the norm is somehow universally true and natural. No doubt the study of mixed jurisdictions also has provided an important and convivial intellectual space for those who experience often marginalized legal identities. Increasingly, however, it appears that a reimagining of the discipline is occurring, whereby the claim is made that 'all legal systems are mixed'⁷⁰ and the analysis then turns on the 'various degrees of hybridity in the legal world arising from different levels and layers of crossing and intertwining'.⁷¹ This analysis strikes us as more in keeping with how culture is itself now understood in other disciplines and we can see no reason why legal culture is exceptional.⁷² Of course, the claim that everything is a hybrid

⁶⁸ Palmer, *supra* note ____.

⁶⁹ I Castellucci, *How Mixed Must a Mixed System Be?*, 12.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW 1 (2008), available at <www.ejcl.org/121/art121-4.pdf>.

⁷⁰ E Órúccú, *What is a Mixed Legal System: Exclusion or Expansion?*, 12.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW 2 (2008), available at <www.ejcl.org/121/art121-15.pdf>.

⁷¹ *Ibid.*, 9.

⁷² As an aside, we cannot help but notice, in common with other law schools in the United Kingdom, the large number of international students intending to return 'home' with an English law degree to pursue a legal

does not provide an answer, but it does open up a new space for the interrogation of legal systems.

In particular, the universalizing of the experience of being a mixed jurisdiction shifts the attention away from the exceptional and back to the dominant norms, demanding that we interrogate and deconstruct frequently unexamined and stereotyped assumptions about the supposed purity of legal systems. Professor Palmer's recent article provides an important direction of travel in this project in his analysis of the process of 'double reasoning' within civilian systems.⁷³ We would go further, arguing that our experience suggests that there are double reasoning processes at work in both the civil law and common law systems, which further challenges the claim that it is somehow unique to the classically understood mixed jurisdiction. As Professor Leckey has argued in a different context, the task of comparison requires attention, not only to the outside, but also demands that we focus upon diversity 'internal to the law of a place' as a means 'to avoid an organic coherence of culture'.⁷⁴ The focus shifts inevitably to pluralism, diversity and living with difference.

Although this shift in focus is conceptually persuasive, we are also left troubled by the question of the utility or value of such comparative analysis. In this respect, we fear that our comparative analysis might be criticized on the same basis as other forms of

career. For these students, the hybridity of legal culture is a fact of their globalized student lives (as is a rarely discussed colonial past which seems ever present in the classroom).

⁷³ Palmer, *supra* note ____.

⁷⁴ Leckey, *supra* note __ at 61.

deconstruction in that, while the analysis may have disruptive power, it provides no recipe for law reform or greater convergence. But an eloquent defense of the exercise of comparison for its own sake has been provided by Professor Legrand. He argues that the role of the comparative lawyer is to 'highlight the contingent and specific character of rules, practices and assumptions'.⁷⁵ The outcome, which may not be easily measurable in terms of 'impact', nevertheless is lofty if not arrogant: the comparative lawyer 'lives more knowledgeably, since through the mediation of an other, the self can become more explicit to itself'.⁷⁶ We would argue that an analogy can be drawn to the rules of grammar. In learning another language, we often develop a much better understanding of the grammar of our first language.

While it might be satisfying to engage in the act of comparison in pursuit of the 'pure' aim of self-knowledge as a good, comparative law has been put to more utilitarian (and utopian) tasks and nowhere is this more apparent than in the context of legal harmonization in the European Union. Attempts to harmonize the law were originally undertaken in the field of contract law and only '[m]ore recently, tort law has been added to the picture, and its harmonization at the European level has become a primary goal for many institutions and research groups.'⁷⁷ The role of harmonization becomes the act of

⁷⁵ P Legrand, *Comparative Law*, in ENCYCLOPEDIA OF LAW AND SOCIETY 220, 221 (D S Clark, ed., 2007, vol 1).

⁷⁶ *Ibid.*, 223.

⁷⁷ M Infantino, *Making European Tort Law: The Game and its Players*, 18 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 45, 46-47 (2010).

mixing those doctrines from different legal systems (and, indeed, jurisdictions) found to be the most appropriate for a transnational legal regime and therefore a new jurisdiction. This will not be an easy task because when private law is at stake we deal with fundamental issues of national identity which inevitably override arguments grounded in the language of 'efficiency'. An example will clarify our point: France, in the tradition of *fraternité*, in the field of tort law translates the principle with 'the arguably broadest regime of strict liability'⁷⁸ and a generous approach to pure economic loss. In contrast England 'takes a much more liberal approach: free citizens are considered responsible for their own luck. Therefore, strict liability is strictly confined ... pure economic losses will be compensated only under special, narrowly confined conditions.'⁷⁹ Even the more modest goal of 'identifying common sets of arguments to be weighed in different ways in various national jurisdictions'⁸⁰ strikes us as a very ambitious project (although we may well part company from each other at this juncture on the merits of the political exercise). But it certainly does seem to both of us that the lesson to be learned from mixed jurisdictions is an appreciation of diversity, difference and hybridity, rather than the pursuit of an imposed unity and sameness. Finally, our experience of comparative tort law leaves us at least somewhat sympathetic to Professor Stapleton's skepticism regarding the practicality of exercises in

⁷⁸ N Jansen, *The State of the Art of European Tort Law. Present Problems and Proposed Principles in EUROPEAN TORT LAW* (M Bussani eds., 2007) 15, 18.

⁷⁹ *Ibid.*

⁸⁰ Smits, *supra* note __ at 6.

comparative tort law.⁸¹ Although she graciously describes ‘the noble cause of comparative law as an intellectual activity’, she is critical of ‘those who focus on its forensic utility’.⁸² Like her, we worry that comparative tort law is ‘fraught with dangers’⁸³ and in the politically contested context of the European Union, attempts at top down remixing are perhaps best avoided.

CONCLUDING REMARKS

The issue of proximity in tort law -- examined from the standpoint of comparative law -- has provided us with a vehicle to explore broader issues surrounding the internal complexity of legal systems, the meaning of a mixed jurisdiction and the perils of European private law harmonization. In retrospect, the choice of proximity is an obvious one in that it is focused on the central issue of responsibility towards others -- where does that responsibility begin and where does it end? It is both a universal question but one which has no easy, uncontested answer. For us, the analysis of proximity opened a door into an examination of proximity in a different sense, namely, the proximity of legal systems to each other and the diversity that can be found internal to a legal system. It allowed us to interrogate the complexity and hybridity within our legal selves as well as the close proximity of the other.

⁸¹ J Stapleton, *Benefits of Comparative Tort Reasoning: Lost in Translation*, 1.6 JOURNAL OF TORT LAW (2007) 773-814.

⁸² *Ibid.*, 773.

⁸³ *Ibid.*, 813.

In short, a greater understanding of the mixed jurisdiction has allowed us to see ourselves more clearly and, as European citizens, it has given us a renewed appreciation of the value of the diverse, the plural, and perhaps even the irreconcilable.